(3)

Supreme Court, U.S.
FILED

05 201 AUG 3 2005

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JIM BURKLOW ET AL., PETITIONERS

v.

BASKIN-ROBBINS USA, CO. ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHARLES S. WIBLE
Counsel of Record
324 ST. ANN STREET
P.O. BOX 337
OWENSBORO, KY 42302
270-926-3377
Attorney for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-2160 ♦ USSCINFO.COM

QUESTION PRESENTED FOR REVIEW

Section 301(a) of the Labor-Management Relations Act states that "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 28 U.S.C. § 185(a). It is well established that a suit to invalidate a contract, where plaintiffs make no allegation that a contract was violated, may not be brought under § 301(a).

The question is:

> Whether a district court must exercise subject matter jurisdiction pursuant to § 301(a) of a suit for a properly pled violation of an agreement between an employer and a labor organization, even if the defendants allege but the plaintiffs deny that another agreement was subsequently executed that supercedes or invalidates the agreement that is the basis of the suit.

PARTIES TO THE PROCEEDING

JIM BURKLOW; KIRBY CAIN; PHIL CALHOUN; GARY CISSNA; WAYNE DUNCAN; RICKY EPISON; MIKE EVANS; WILLIAM GILLASPIE; BARRY HAGAN; JAMES HATFIELD; MARK HAWKINS; JOE HOFFMAN; MALCOLM HOWARD; CHARLES I. JAMES; SCOTT KNIGHT; BILL MCDANIEL; CHUCK MITCHELL; SCOTT MULLIGAN; NICK NICELY; GEORGE PAPPAS; JEFF PAYNE; JAROD SIMON; BOBBY SIKES; ROBERT T. SUTHERLAND; ALLEN R. TINSLEY; RONNIE THOMAS; DANNY WATHEN; DARREN WATHEN; ROBBIE BAIZE; ROBERT A. GREATHOUSE; HENRY HEAD; LARRY HENDERSON; JAMES JARBOE; ROGER KEOWN; JEFF KASINGER; DARRELL MCELWAIN; DAVID MIDKIFF; GARY RANSON; RONALD ROBERTS; CARL SNYDER; STEPHEN TEASLEY; JAMES TIGUE; JOHN WATHEN; JOHN PAPPAS, PETITIONERS

BASKIN-ROBBINS USA, CO.; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, A.F.L., C.I.O. LOCAL UNION 783, RESPONDENTS

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 7

APPENDIX

Circuit Court Decision 1a
District Court Judgment 5a
District Court Memorandum Decision & Orders 6a
Denial of Petition for Rehearing 24a

TABLE OF AUTHORITIES

CASES

ADCOX V. TELEDYNE, INC., 21 F.3D 1381 (6TH CIR. 1994) 5, 15, 17

ARBAUGH V. YELT CORP., 380 F.3D 219, 223-25 (5TH CIR. 2004) 25

ARIZONANS FOR OFFICIAL ENGLISH V. ARIZONA, 520 U.S. 43, 73 (1997) 10

BAUER V. RBX INDUSTRIES, INC., 368 F.3D 569 (6TH CIR. 2004) .....PASSIM

BELL V. HOOD, 327 U.S. 678, 681-83 (1946) 19, 20

BURKLOW V. BASKIN-ROBBINS, NO. 03-66115 (6TH CIR. 2005) 8

COHENS V. VIRGINIA, 6 WHEAT. 264 (1821) 10

CUTSHALL V. SUNDQUIST, 193 F.3D 466, 471-72 (6TH CIR. 1999) 26

EIGHTH (NOVARTIS SEEDS, INC. V. MONSANTO COMPANY, 190 F.3D 868 (1999) 23

FIRST (U.S. V. LAHEY CLINIC HOSPITAL, INC., 399 F.3D 1 (1ST CIR. 2005) 23

GODFREY V. PULITZER PUBLISHING CO., 161 F.3D 1137 (8TH CIR. 1998) 23, 25

HEUSSNER V. NATIONAL GYPSUM CO., 887 F.2D 672 (6TH CIR. 1989) 5, 15

IN RE STOCK EXCHANGES OPTIONS TRADING ANTITRUST LITIGATION, 317 F.3D 134 (2003) 23

INTERNATIONAL UNION OF OPR. ENGR. V. RABINE, 161 F.3D 427 (7TH CIR. 1998) ..... PASSIM

J. W. PETERS, INC. V. BRIDGE, STRUCTURAL AND REINFORCING IRON WORKERS, LOCAL UNION 1, 398 F.3D 967 (2005) 18, 23

KLINE V. BURKE CONSTRUCTION CO., 260 U.S. 226 (1922) .. 22

LIBYAN ARAB JAMAHIRIYA, 376 F.3D 1123, 1134 (D.C. CIR. 2004) 23

MORRISON V. AMWAY CORP., 323 F.3D 920, 928-29 (11TH CIR. 2003) 25

MORROS, 268 F.3D AT 703 17

NEW ORLEANS PUB. SERV., INC. V. COUNCIL OF CITY OF NEW ORLEANS, 491 U.S. 350, 359 ..... 10, 22

NINTH (U.S. V. MORROS, 268 F.3D 695, 699-703 (9TH CIR. 2001) 23

NOWAK V. IRONWORKERS LOCAL 6 PENSION FUND, 81 F.3D 1182, 1189 (2D CIR. 1996) 19

PLANNED PARENTHOOD V. SANCHEZ, 403 F.3D 324, 332 (5TH CIR. 2005) 25

RICHARD V. HOECHST CELANESE CHEMICAL GROUP, 355 F.3D 345 (5TH CIR. 2003) 25

SAFE AIR FOR EVERYONE V. MEYER, 373 F.3D 1035, 1038-40 (9TH CIR. 2004) 23

SECOND (DA SILVA V. KINSHO INTERN. CORP., 229 F.3D 358 (2D CIR. 2000) 23, 24

STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT, 523 U.S. 83 (1998) ..... PASSIM

TENTH (DAVOLL V. WEBB, 194 F.3D 1116 (10TH CIR. 1999) 23, 25

TEXTRON LYCOMING ENGINE DIV. V. UAW, 523 U.S. 654 (1998) ..... PASSIM

TEXTRON LYCOMING RECIP. ENG. V. AUTO. WORKERS, 523 U.S. 653, 658 (1998) 7, 8, 11

THIRD (NESBIT V. GEARS UNLIMITED, INC., 347 F.3D 72 (3D CIR. 2003) 23, 24

VERIZON MARYLAND, INC. V. PUBLIC SERVICE COMMISSION OF MARYLAND, 535 U.S. 635 (2002) 20

COME Plaintiffs-Appellants, Jim Burklow, et al., pray for petition for a writ of certiorari from this Court to the United States Court of Appeals for the Sixth Circuit to review its judgment in the matter, *Burklow, et al., v. Baskin-Robbins USA, Co. and International Brotherhood of Teamsters, A.F.L., C.I.O. Local Union No. 783*, Sixth Circuit case no. 03-6115, issued January 12, 2005.

OPINIONS BELOW

Opinion, *Jim Burklow, et al. v. Baskin-Robbins USA, Co. and International Brotherhood of Teamsters, A.F.L., C.I.O. Local Union No. 783*, No. 03-6115 (6th Cir. Jan. 12, 2005)

Judgment, *Jim Burklow, et al. v. Baskin-Robbins USA, Co. and International Brotherhood of Teamsters, A.F.L., C.I.O. Local Union No. 783*, No. 4:01-CV-147-M (W.D. Ky. Jul. 22, 2003) (R. 85)

Memorandum Opinion and Orders, *Jim Burklow, et al. v. Baskin-Robbins USA, Co. and International Brotherhood of Teamsters, A.F.L., C.I.O. Local Union No. 783*, No. 4:01-CV-147-M (W.D. Ky. Jul. 22, 2003) (R. 84)

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 12, 2005. The Court of Appeals denied a timely petition for rehearing with suggestion for rehearing *en banc* on May 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the district court was invoked under 29 U.S.C. § 185(a), because the plaintiffs brought a suit for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in the Labor-Management Relations Act. The primary issue in this case is whether the district court did, in fact, have jurisdiction pursuant to that statutory provision.

RELEVANT PROVISIONS INVOLVED

29 U.S.C. § 185(a):

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT

In 1998, Plaintiffs-Appellants ("the members"), members of the International Brotherhood of Teamsters, Local Union No. 783 ("the Union") in Owensboro, Kentucky, entered into a four-year collective bargaining agreement with Defendants-Appellees, Baskin Robbins U.S.A., Co. ("Baskin Robbins"), that would assure them secure jobs for four years in return for short-term concessions as to pay and benefits. R. 75, Memorandum in Response to Defendants' Motion for Summary

Judgment, Ex. B. Evidence of record supports a finding that Baskin Robbins intended to close the plant before the end of the four year contract period when it made the agreement or at least made the decision soon afterwards. R. 75, Memorandum in Response to Defendants' Motion for Summary Judgment, Ex. A. Baskin Robbins and the Union later entered into a "successors and assigns clause" to the 1998 Agreement, which provided for $1 million in liquidated damages to be paid to employees if the plant's operations were transferred elsewhere. 6a, Memorandum, Opinion, and Order, at 7a.

In January 2001, Baskin-Robbins announced that it was closing the plant and transferring its operations on March 15, 2001, prior to the end of the 1998 Agreement term. 6a, Memorandum Opinion and Order, at 7a. The Union negotiated a plant closing agreement, but the members claim the Union deceived them about whether a vote in favor of the new agreement would eliminate their opportunity to pursue a grievance for failure to honor the successors and assigns clause. 6a, Memorandum Opinion and Order, at 7a-8a. The Union also represents the workers who ended up with Baskin-Robbins' business after the Owensboro plant closure.

The members filed this "hybrid" action for violation of the 1998 collective bargaining agreement against Baskin-Robbins and for breach of the duty of fair representation against the Union in the United States District Court for the Western District of Kentucky. The basis of jurisdiction was § 301 of the Labor-Management Relations Act. R. 29, Second Amended Complaint, at ¶ VI.

The complaint contains the following allegations that Baskin-Robbins had breached the 1998 Agreement and the successors and assigns clause as follows:

> The Plaintiffs herein allege a breach in the contract clause requiring Defendant, Baskin-Robbins to inform the Union 30 days prior to entering into negotiations that would affect the relationship between Baskin-Robbins USA, Inc. and Teamsters Local No. 783. The Plaintiffs herein further allege Defendant, Baskin-Robbins breached the contract by failing to abide by the contract liquidated damages clause ["successors and assigns clause"] thereby illegally denying members their right to the bargained-for liquidated damages for the completion of only 3 years of a 4 year agreement.

R. 29, Second Amended Complaint, at ¶ XV (clarification added). In their response to Baskin-Robbins' motion for summary judgment, the members also alleged that Baskin-Robbins had anticipatorily breached the 1998 Agreement by conceiving and implementing a plan to close the Owensboro plant even before the 1998 Agreement had been signed. R. 75, Memorandum in Response to Defendants' Motion for Summary Judgment, at 14-15.

Baskin-Robbins' primary defense was that the 1998 Agreement was not valid because it had been superceded by the plant closing agreement and that therefore the district court lacked subject matter jurisdiction of the case under Sixth Circuit precedent. R 42, Memorandum in Support of Defendant Baskin

Robbins USA, Co's Motion for Summary Judgment, at 16-18.

The members relied on this Court's recent decision in *Textron Lycoming Engine Div. v. UAW*, 523 U.S. 654 (1998) to support its position that the district court had jurisdiction. R. 75, Memorandum in Response to Defendants' Motion for Summary Judgment, at 19-24. *Textron* had held that a district court only has jurisdiction of suits in which the plaintiffs allege a breach of a collective bargaining agreement, but because of widespread confusion over the reach of § 301 jurisdiction, this Court went on to make its holding very precise:

> This does not mean that a federal court can never adjudicate the validity of a contract under § 301. That provision simply erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse. Thus, *if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid the court may, consistent with § 301(a), adjudicate that defense*.

Textron, 523 U.S. at 657-58.

In this case, the District Court dismissed for lack of subject matter jurisdiction without any findings that any of the agreements were valid or invalid, relying on two Sixth Circuit cases, *Adcox v. Teledyne, Inc.*, 21 F.3d 1381 (6th Cir. 1994) and *Heussner v. National Gypsum Co.*, 887 F.2d 672 (6th Cir. 1989), that predated *Textron*: